Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

BETH LEONARD, On Behalf of Herself and all Others Similarly Situated,

Petitioner,

vs.

NORTHWEST AIRLINES, INC.,

Respondent.

On Petition For Writ Of Certiorari To The State Of Minnesota Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court held in *American Airlines v. Wolens*, 513 U.S. 219 (1995), that the Airline Deregulation Act, 49 U.S.C. §§40101, *et seq.* (the "ADA"), does not preempt routine breach-of-contract actions brought against airlines in state courts, because contract law is not "diverse, nonuniform, and confusing."

The question presented is whether, under *Wolens*, the ADA preempts state-court contract actions in which a plaintiff sues an airline to recover monies she paid pursuant to penalty clauses that are uniformly forbidden under contract law.

PARTIES

Petitioner Beth Leonard, on behalf of herself and all others similarly situated, was the Plaintiff-Petitioner before the Minnesota Supreme Court. Respondent Northwest Airlines, Inc., was the Defendant-Respondent before the Minnesota Supreme Court.

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I. OPINIONS BELOW

The Minnesota Supreme Court's order denying review of Leonard's petition for further review is found at 2000 Minn. LEXIS 218 (Minn. Apr. 18, 2000), and is reprinted at App. 1. The Minnesota Court of Appeals' February 8, 2000 opinion affirming the Dakota County District Court's dismissal is published as *Leonard v. Northwest Airlines, Inc.*, 605 N.W.2d 425 (Minn. Ct. App. 2000). *See* App. 2-16. The state district court's Memorandum dismissing the case with prejudice is unpublished, and reprinted for the Court's convenience. *See* App. 18-23.

II. BASIS FOR JURISDICTION IN THIS COURT

The Minnesota Supreme Court denied further review on April 18, 2000. App. 1. This Court has jurisdiction under 28 U.S.C. §1257(a).

III. STATUTORY PROVISIONS INVOLVED IN THE CASE

A. Airline Deregulation Act Preemption Clause

49 U.S.C. §41713 (1999)

49 U.S.C. §41713. Preemption of authority over prices, routes, and service

* * *

(b) Preemption. – (1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air

carrier that may provide air transportation under this subpart.

B. Airline Deregulation Act "Savings Clause"

49 U.S.C. §40120 (1999)

49 U.S.C. §40120. Relationship to other laws

* * *

(c) Additional remedies. – A remedy under this part is in addition to any other remedies provided by law.

IV. STATEMENT OF THE CASE

A. Introduction

In 1978, Congress enacted the Airline Deregulation Act, 49 U.S.C. §§40101, *et seq.* ("ADA"), which largely deregulated domestic air transport. To ensure that the states would not undo federal airline deregulation with regulations of their own, Congress included in the ADA a preemption provision prohibiting the states from enacting or enforcing any law relating to airline prices, routes, or services. *American Airlines v. Wolens*, 513 U.S. 219, 222-23 (1995); *see also Morales v. Trans World Airlines*, 504 U.S. 374, 378-79 (1992). Significantly, Congress also included in the ADA a "savings clause," preserving existing common law remedies. *See* 49 U.S.C. §40120(c); *see also Wolens*, 513 U.S. at 232. It is the ADA's preemption provision, and its effect upon a contract action brought against an airline in a Minnesota state court, that lie at this Petition's heart.

In *Wolens*, this Court held that the ADA's preemption clause was *not* a blanket preemption of *all* state law; rather, the ADA would not preempt a state-court action requiring the enforcement of Illinois state contract law, because at its core, state contract law is *not* " 'diverse, nonuniform, and confusing.' " *Wolens*, 513 U.S. at 233 n.8 (citation omitted). In other words, general contract law was not so state-specific that it would be used by litigants to undo federal deregulation. Myriad courts in a variety of state and federal fora recognize that the ADA does not preempt contract actions involving airlines.[1]

It is beyond dispute that "[i]n all pre-emption cases, and *particularly* those in which Congress has 'legislated . . . in a field which the States have *traditionally occupied*,' we 'start with the assumption' " that those

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[1] *See, e.g., Travel All Over the World v. Kingdom of Saudi Arabia*, 73 F.3d 1423 (7th Cir. 1996) (reversing preemption of contract claims); *In re Air Transp. Excise Tax Litig.*, 37 F. Supp. 2d 1133 (D. Minn. 1999); *Johnson v. American Airlines*, 663 N.E.2d 54 (Ill. Ct. App. 1996) (Illinois breach-of-contract claims not preempted by the ADA); *Seals v. Delta Air Lines*, 924 F. Supp. 854 (E.D. Tenn. 1996) (court undertakes *"Erie"* analysis to decide *which state's contract law applies*); *Shupe v. American Airlines*, 893 S.W.2d 305 (Tex. Ct. App. 1995) (plaintiff's contract claims not preempted), *aff'd sub nom. Continental Airlines v. Kiefer*, 920 S.W.2d 274 (Tex. 1996); *Hoo Siong Chow v. Trans World Airlines*, 544 N.E.2d 548 (Ind. Ct. App. 1989) (court looks to *Restatement (Second) of Contracts* §90 (1997), and grants promissory estoppel recovery); *Crites v. Delta Air Lines*, 341 S.E.2d 264 (Ga. Ct. App. 1986) (applying Georgia contract law to alleged breach); *Vick v. National Airlines, Inc.*, 409 So. 2d 383 (La. Ct. App. 1982) (court finds breach of contract, and utilizes principles of foreseeability, mitigation, and availability of non-pecuniary damages for ticket purchasers' mental distress).

fields were not to be superseded " 'unless that was the clear and manifest purpose of Congress.' " *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (emphasis added, citation omitted). Despite this axiom, and *Wolens'* holding, the Minnesota Supreme Court has let stand a conflicting Minnesota Court of Appeals' holding that although actions brought to *enforce* contract terms are not preempted by the ADA, actions brought challenging a liquidated damages clause as unenforceable under Minnesota contract law are preempted. In other words, as the Minnesota courts read *Wolens, defenses* to recovery for breach of contract are always preempted, because their adjudication would require a court to look beyond the bare words of the contract and apply basic contractual principles. This is directly at odds with *Wolens*.

B. Factual Background

Petitioner Beth Leonard is a Minnesota resident who purchased an economy-class air travel ticket from Respondent Northwest Airlines in the Fall of 1998. Northwest's air travel tickets constitute "contracts of carriage" between it and ticket purchasers. Of particular note for this Petition, the airline's economy-class tickets include standardized monetary penalties to dissuade ticketing changes.

The penalties typically operate as follows: when a passenger does not fly on Northwest as ticketed, she forfeits the entire fare unless she applies it toward a new contract of carriage within a certain time – *and* pays an additional $75 "reissue fee." Regardless of the actual

ticket price or services Northwest provides, the penalty features *remain the same* in every contract of carriage.

Leonard was unable to travel on Northwest in accordance with her travel itinerary in October 1998 – in effect, breaching the contract. Pursuant to the contractual penalty terms, Northwest retained Leonard's full ticket price until she re-booked another flight and paid a $75 reissue penalty (plus the difference in fare).

Leonard, on behalf of herself and a class of similarly situated ticket purchasers, sued Northwest to recover monies she paid the airline pursuant to the penalty clause. Because the amount of the penalty bore no rational relation to either the ticket price *or* what it cost Northwest to reissue the ticket, Leonard alleged that she had been forced to pay illegal contract penalties disguised as liquidated damages. *See, e.g., Restatement (Second) of Contracts* §356 (1997) (Liquidated Damages and Penalties). She alleged that Minnesota law, consistent with contract-law principles of all states and the United States, forbade the illegal penalties.

C. Procedural History

1. Minnesota District Court

The federal question presented by this Petition – whether §41713(b) of the ADA preempts Leonard's state-law contract claims – was initially raised by Northwest in the Minnesota state district court on its motion to dismiss. App. 19.

That court agreed with Northwest, holding that the ADA overrode state law and preempted Leonard's claims

of an illegal penalty and unjust enrichment. App. 23. The court said that Leonard's claims violated both "prongs" of the ADA's preemption clause: Northwest's reissue penalty was "a price, and therefore has a connection with the Defendant's rates," App. 20, and Leonard's cause of action required the "enforcement" of Minnesota contract law. App. 22. Citing this Court's decision in *Wolens*, 513 U.S. at 233 n.8, the district court held that state contract law now could be used "only . . . to enforce the parties' bargain." App. 22. The court decided that because Leonard sought not to enforce a contract, but rather to recover monies paid pursuant to its illegal penalty clause, she was trying to "rewrite the bargained-for agreement" and "avoid the contract." App. 22. Indeed, the district court imposed sanctions against Leonard (later reversed) for having sued Northwest. App. 23. Leonard timely appealed to the Minnesota Court of Appeals.

2. Minnesota Court of Appeals

Leonard argued on appeal that the ADA did not preempt her claims because she was not seeking to have Minnesota enforce its own government-imposed policies, but rather to apply uniform, normative rules governing every contract in all 50 states. She pointed out that this Court had made a similar distinction in *Wolens*, holding that there was "no large risk of nonuniform adjudication" in state-court contract actions involving airlines. 513 U.S. 233 n.8. She asserted that enforcing the uniform law against contractual penalties was consistent with Congress's aim of promoting, through the ADA, economic

efficiency in airline travel. *See, e.g., Wolens*, 513 U.S. at 230.

Leonard also explained that the ADA's "savings clause" expressly provides that common-law remedies – like those arising from contract actions – are not pre-empted by the statute; to the contrary, any remedies under the ADA are "in addition to any other remedies provided by law." 49 U.S.C. §40120(c); *see also Wolens*, 513 U.S. at 232 ("conclusion that the ADA permits state-law-based court adjudication of routine breach-of-contract claims also makes sense of Congress' retention of the [ADA's] saving clause"). She noted that she had no alternative forum in which to pursue her remedies against Northwest – a reality that this Court explicitly recognized in *Wolens* when it held that it was not "plausible that Congress meant to channel into federal courts the business of resolving . . . the range of contract claims relating to airline rates, routes, or services." 513 U.S. at 232.

The Court of Appeals affirmed the district court's dismissal in a February 8, 2000 opinion (the "Minnesota Opinion"). Interpreting the ADA's preemption provision broadly, it held that Northwest's penalty clause "related to" the airline's ticket prices, App. 10, and that Leonard was not seeking to enforce the parties' bargain, but was "instead seek[ing] to enforce state-imposed obligations against contract penalties." App. 12-13.

Despite affirming the district court's dismissal, the Court of Appeals acknowledged that Leonard's claims had "a legal basis" under this Court's ADA preemption jurisprudence. App. 3. The court specifically noted that Leonard's "interpretation of the ADA after *Wolens* is no

more frivolous or unwarranted than were the *Wolens* plaintiffs' claims in light of *Morales*." App. 16. Although *Wolens* "articulates the analysis in which courts must engage," said the court, "the 'line separating allowable claims from ADA-preempted ones remains fuzzy.' " App. 16 (citing *Air Transp. Excise Tax*, 37 F. Supp. 2d at 1140). The Court of Appeals then reversed the sanctions award, and refused to impose the additional attorneys' fees on appeal that Northwest had requested. App. 3, 16.

3. Minnesota Supreme Court

Leonard timely petitioned the Minnesota Supreme Court for review of the Court of Appeals' affirmance of dismissal. On April 18, 2000, the Minnesota Supreme Court denied further review, App. 1, giving this Court jurisdiction. *See* 28 U.S.C. §1257(a); *see also* S. Ct. Rule 13.1.

V. ARGUMENT

A. The Minnesota Courts Have Decided an Important Federal Question in a Way that Conflicts with this Court's Relevant Decisions

Simply put, the Minnesota Opinion misconstrues *Wolens* to mean that the only state-law contract actions allowed under the ADA are those in which the parties seek mechanically to *enforce* the bare words of a contract – but not those in which one party alleges that the contract contains an illegal penalty clause or fails for another reason. This decision on an important federal question

conflicts with relevant decisions of this Court. *See* S. Ct. Rule 10(c).

The Minnesota Opinion rests upon a hypertechnical distinction, found nowhere in *Wolens*, between a claim to *enforce* a contract, and a claim or defense challenging an illegal contractual penalty. The Minnesota courts say *Wolens* allows the former, but forbids the latter, creating an absurdity of immense proportions given the wide range of contexts in which contract actions arise – actions for damages, rescission, reformation, specific performance, and declaratory judgments – and the issues they necessarily raise, like contract formation, illegality, or rescission, to name but a few. Taken to its logical conclusion, the Minnesota view means that no party to an airline-related contract dispute ever may rely upon any argument other than the contract as written. Defenses to the enforcement of a contract – like lack of capacity, mistake, or lack of consideration – never could be asserted or considered, according to Minnesota, because they would be impermissibly "outside" the "bargain" the parties had entered. App. 11.

But that is not what *Wolens* holds. This Court explained that, at its core, contract law is *not* " 'diverse, nonuniform, and confusing.' " *Wolens*, 513 U.S. at 233 n.8 (citation omitted). Thus, there is no "large risk of nonuniform adjudication" of contract claims by courts in different states. *Id.* The application of contract principles – which must necessarily include *defenses* to breaches of contract – simply is not equivalent to a state applying its

"*own* substantive standards." *Id.* at 232 (emphasis added).[2]

A closer examination of *Wolens* reveals the extent to which the Minnesota courts have misconstrued its holding. Plaintiff Myron Wolens sued American Airlines on behalf of a class composed of the airline's "frequent flyers," alleging that the airline's retroactive devaluation of frequent-flyer credits was a breach of contract under Illinois law *and* violated Illinois' consumer fraud statute. *Wolens*, 513 U.S. at 224-25. The airline asked this Court to hold that the ADA's preemption provision blocked application of Illinois' consumer protection and contract laws.

This Court held that Wolens' consumer fraud claim was preempted by the ADA, but that his common-law contract claim could proceed. *Id.* at 226. The Court explained that the ADA's ban on state enforcement is "most sensibly read" to mean that a state cannot seek to impose its *own* public policies, or theories of competition or regulation, on air carrier operations. *Id.* at 229 n.5.

Under this analysis, only Wolens' consumer fraud claim was barred because the Illinois Consumer Fraud Act was the type of policy-laden consumer protection legislation that the Court previously had deemed preempted. *Id.* at 227 (citing *Morales*, 504 U.S. 374). The

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[2] Scholars and commentators have long recognized that the "*entire law of contracts* plays a major role in determining the terms of [a] contract." 1 *Corbin on Contracts* §1.3 (1993) (emphasis added). "A contract is not a law, nor does it make law; *it is the agreement plus the law* that makes the ordinary contract an enforceable obligation." 17A *Am. Jur. 2d Contracts* §1 (1991) (emphasis added).

application of Illinois state contract law to his claims posed no such problems, however. Indeed, the Court sent the case back to the Illinois state court for a "full airing" of "contract interpretation" issues, knowing full well that both sides would offer all arguments in favor of and against contract enforcement. *Id.*

But the Minnesota Opinion equates *any* reference to state-law contract defenses to this Court's refusal in *Wolens* to allow reliance on " 'what the State dictates' " in its unique consumer protection statute. App. 11 (citing *Wolens*, 513 U.S. at 233). This view obliterates the careful distinction *Wolens* made between courts applying uniform contractual principles, as opposed to venturing into the *verboten* realm of *state*-dictated, policy-laden principles.

The Minnesota Opinion also conflicts with this Court's conclusion that "the ADA permits state-law-based court adjudication of routine breach-of-contract claims" because of "Congress' retention of the [ADA's] saving clause." *Wolens*, 513 U.S. at 233.[3] The ADA's pre-emption provision, complemented by its savings clause,

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[3] The ADA's "savings clause" expressly provides that common-law remedies – like those arising from contract actions – are not preempted, but are "in addition to any other remedies provided by law." 49 U.S.C. §40120(c). At the time of the *Wolens* decision, the ADA's savings clause expressly preserved " 'the remedies now existing at common law or by statute.' " *Wolens*, 513 U.S. at 232 (quoting 49 U.S.C. §1506 (repealed)). The savings clause now similarly states that "[a] remedy under this part is in addition to any other remedies provided by law." 49 U.S.C. §40120(c). The change was made to eliminate unnecessary words and add clarity and consistency to the title. H.R. Conf. Rep. No. 103-180, at 276 (1994), *reprinted in* 1994 U.S.C.C.A.N. 818, 1093.

simply "stops States from imposing their own substantive standards with respect to rates, routes, or services, *but not from affording relief* to a party" alleging contract claims. *Wolens*, 513 U.S. at 232-33 (emphasis added). And the Minnesota courts fail to heed *Wolens'* admonition that state court is the proper setting for airline-related contract disputes, because it was "not plausible" that Congress meant to channel into the federal courts "the range of contract claims relating to airline rates, routes, or services." *Id.* at 232.[4]

Because the Minnesota Opinion starkly conflicts with this Court's *Wolens* opinion, a writ of certiorari is warranted.

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[4] The Court of Appeals grudgingly acknowledged that Leonard "does not have another forum in which she can adjudicate her grievance with Northwest directly," but suggested that she approach the Department of Transportation and ask it "to take action." App. 13. That suggestion rings hollow, however, because this Court took pains to explain that "the DOT has neither the authority nor the apparatus required to superintend a contract dispute resolution regime." *Wolens*, 513 U.S. at 232. Nor would a petition, even if successful, remedy injuries already suffered by Leonard and the thousands like her who have been forced to pay illegal contract penalties: the DOT cannot reimburse ticket purchasers for monies they have forfeited to Northwest's illegal contract penalties. Even when the DOT penalizes airlines for violations of DOT rules and regulations, there is no provision for payments to the private parties injured by those violations. *See, e.g., Romano v. American Trans Air*, 56 Cal. Rptr. 2d 428, 431 n.5 (Cal. Ct. App. 1996) ("There is no provision for the recovery of damages by a private party.").

B. A Definitive Answer to the Question Presented Will Ensure that Airlines Abide by Normative Contract Rules, While Reaffirming a Continuing Respect for Federalism, and Further Refining an Unsettled Area of Law

In addition to its clear conflict with *Wolens*, the Minnesota Opinion impermissibly erodes contractual norms and elevates airlines – in contract actions, at least – to virtually untouchable status. By preempting uniform and basic contract principles rejecting forfeitures, App. 11, the Minnesota Opinion divorces those principles from all airline-related contracts. Minnesota state courts facing airline-related contract suits are now prohibited from applying the core principles inherent in every contract – like offer and acceptance, or defenses to enforceability – and instead only can read the contract. Airlines will be free to form and enforce contracts in Minnesota containing any imaginable term, no matter how onerous or illegal.

Surely this is not what Congress intended when it passed the ADA. This Court seems to agree. *See Morales*, 504 U.S. at 390 (ADA did not give airlines *"carte blanche"* to injure consumers); *see also Air Transp. Excise Tax*, 37 F. Supp. 2d at 1140 (ADA not passed so that airlines could be "immunized from state law consequences"). And Congress's intent in passing the statute "is the ultimate touchstone 'in every preemption case.' " *Medtronic*, 518 U.S. at 494 (citation omitted); *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978). As *Wolens* made clear, Congress's purpose in passing the ADA was "to promote 'maximum reliance on competitive market forces.' " 513 U.S. at 230

(quoting *Morales*, 504 U.S. at 378). It was not to trample on traditional areas of state oversight.

Bedrock principles of federalism require that courts not infer a scope of preemption beyond that which Congress clearly mandated. *Department of Revenue v. ACF Indus.*, 510 U.S. 332, 345 (1994); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 533 (1992) (Blackmun, J., concurring). "In all pre-emption cases, and *particularly* those in which Congress has 'legislated . . . in a field which the States have *traditionally occupied*,' we 'start with the assumption' " that those fields were not to be superseded " 'unless that was the clear and manifest purpose of Congress.' " *Medtronic*, 518 U.S. at 485 (emphasis added, citation omitted). The Minnesota Opinion ignores that assumption, however, and approves a result fraught with anti-federalism implications.

This Court recognized that the reach of ADA preemption could not be defined " 'on the basis of one or two cases, but require[s] a closer working out.' " *See Wolens*, 513 U.S. at 234-35 (citation omitted). Since *Wolens*, other courts have "struggled to draw the line that separates allowable state law claims from ADA-preempted ones." *Air Transp. Excise Tax*, 37 F. Supp. 2d at 1139; *see also Charas v. Trans World Airlines*, 160 F.3d 1259, 1263 (9th Cir. 1998) (en banc) (scope of ADA preemption has been the "source of considerable dispute since its enactment"). With their expansive application of ADA preemption, the Minnesota courts have presented this Court with the opportunity to further elucidate and rationalize the contours and limitations of *Wolens*.

VI. CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Dated: July 17, 2000

Respectfully submitted,

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STATE OF MINNESOTA

IN SUPREME COURT

C0-99-948

Beth Leonard, on behalf of herself and all others similarly situated,

Appellant,

vs.

Northwest Airlines, Inc.,

Respondent.

ORDER

(Filed Apr. 18, 2000)

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Beth Leonard for further review be, and the same is, denied.

Dated: April 18, 2000

BY THE COURT:

/s/ Kathleen A. Blatz
Kathleen A. Blatz
Chief Justice

LANCASTER, J., took no part in the consideration or decision of this case.

STATE OF MINNESOTA

IN COURT OF APPEALS

C0-99-948

Beth Leonard, on behalf of herself and
all others similarly situated,
Appellant,

vs.

Northwest Airlines, Inc.,
Respondent.

Filed February 8, 2000
Affirmed in part and reversed in part; motion denied
Lansing, Judge

Dakota County District Court
File No. C6996083

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Considered and decided by Lansing, Presiding Judge, Willis, Judge, and Halbrooks, Judge.

SYLLABUS

The Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended in scattered sections of 49 U.S.C.), preempts breach-of-contract and unjust-enrichment claims alleging that the fee an airline charges for reissuing a ticket is an illegal penalty under Minnesota law.

OPINION

LANSING, Judge

The district court dismissed an airline ticket purchaser's breach-of-contract and unjust-enrichment claims as preempted by the Airline Deregulation Act (ADA) and awarded the airline attorneys' fees under Minnesota Rule of Civil Procedure 11. We agree that the ADA preempts the claims. But the ticket purchaser's argument that the claims are outside the scope of the ADA's preemption clause has a legal basis, and we therefore reverse the attorneys' fees award and decline to impose attorneys' fees on appeal.

FACTS

Beth Leonard purchased a nonrefundable ticket from Northwest Airlines to fly from Minneapolis to Las Vegas on October 24 and from Las Vegas back to Minneapolis on October 28, 1998. Leonard did not travel as ticketed, but rebooked to travel with Northwest at a later date. Northwest charged Leonard a $75 fee for reissuing the ticket.

The contract governing the relations between Northwest and its passengers is known as a "contract of carriage." Under the contract, a ticket holder with Leonard's type of nonrefundable ticket who does not fly as ticketed may, within one year of the ticket's issuance, apply the unused ticket fare toward a new contract of carriage, but must then pay an additional $75 fee. A ticket holder who does not use the original ticket or have it reissued forfeits the entire fare.

Leonard, on behalf of herself and other similarly situated ticket purchasers, sued Northwest for breach of contract and unjust enrichment, seeking damages, costs, attorneys' fees, and declaratory and injunctive relief. Leonard alleged not that Northwest failed to abide by the terms of the contract, but that the reissue fee is an illegal penalty under Minnesota law because it bears no rational relationship to the actual cost of reissuing the ticket.

Northwest moved to dismiss Leonard's complaint on preemption grounds and requested attorneys' fees and costs under Minnesota Rule of Civil Procedure 11. The district court dismissed Leonard's complaint and awarded $500 attorneys' fees. Leonard appeals the dismissal of her action and the imposition of attorneys' fees. Northwest moves under Minnesota Rule of Civil Appellate Procedure 139.06 and Minnesota Statutes section 549.211 (1998) for attorneys' fees incurred on appeal.

ISSUES

I. Does the Airline Deregulation Act preempt breach-of-contract and unjust-enrichment claims based on a state law theory of illegal penalty?

II. Are the claims unwarranted under existing law so as to justify sanctions under Minnesota Rule of Civil Procedure 11, and is the appeal frivolous under Minnesota Statutes section 549.211 (1998)?

ANALYSIS

On appeal from the district court's dismissal of a complaint for failure to state a claim on which relief can be granted, we review de novo the claim's legal sufficiency. *Barton v. Moore*, 558 N.W.2d 746, 749 (Minn. 1997); *State ex rel. Graham v. Klumpp*, 536 N.W.2d 613, 615 (Minn. 1995). When federal preemption bars relief under any set of facts consistent with the pleadings, the complaint fails to state a claim and must be dismissed. *See Lister v. Stark*, 890 F.2d 941, 946 (7th Cir. 1989) (citing *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232 (1984) (interpreting Fed. R. Civ. P. 12(b)(6), federal counterpart to Minn. R. Civ. P. 12.02(e))).

I

Whether a claim is preempted is a question of congressional intent that is "at bottom" a legal question of statutory construction. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383, 112 S. Ct. 2031, 2036 (1992). An analysis of congressional intent therefore " 'begin[s] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.' " *Id.* (citation omitted). If the text itself does not resolve the preemption question, the analysis moves to the structure and purpose of the Act containing the preemption language. *New York State*

Conference of Blue Cross v. Travelers Ins. Co., 514 U.S. 645, 655-56, 115 S. Ct. 1671, 1677 (1995).

Until 1978, airlines were subject to federal regulation of fares, routes, and services under the Federal Aviation Act of 1958 (FAA). *American Airlines v. Wolens*, 513 U.S. 219, 222, 115 S. Ct. 817, 821 (1995). The FAA did not have a preemption clause and in fact contained a saving clause providing that

> '[n]othing * * * in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.'

Id. (quoting FAA). In 1978, Congress enacted the Airline Deregulation Act. The enactment was motivated by congressional belief that " 'maximum reliance on competitive market forces' would best further 'efficiency, innovation, and low prices' as well as 'variety [and] quality * * * of air transportation services.' " *Morales*, 504 U.S. at 378, 112 S. Ct. at 2034 (quoting ADA). To prevent states from undoing deregulation, Congress included a preemption clause:

> [A] State * * * may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier.

49 U.S.C. § 41713(b)(1) (1994). But Congress retained the FAA's saving clause, *see* 49 U.S.C. § 40120(c) (1994), thereby reinforcing the judicial presumption against preemption, particularly on matters commonly reserved to state regulation. *See Wellons v. Northwest Airlines, Inc.*, 165 F.3d 493, 495 (6th Cir. 1999) (ADA does not vitiate traditional presumption against preemption).

In two successive cases, the U.S. Supreme Court forged a two-part test for resolving whether a state claim is preempted by the ADA. *Wolens*, 513 U.S. at 226, 115 S. Ct. at 823; *Morales*, 504 U.S. at 384, 112 S. Ct. at 2037. To be preempted, the claim must (1) relate to prices, routes, or services, and (2) constitute an enactment or enforcement of state law. *Wolens*, 513 U.S. at 226, 115 S. Ct. at 823. Leonard asserts that her claims are not preempted because they neither relate to price or services nor attempt to enact or enforce state law. We address Leonard's arguments on each of the prongs of the preemption test in turn.

Relate to

In defining the first prong of the preemption test, the Court has applied a textual "plain-meaning" interpretation to the phrase "relating to."[1] *Morales*, 504 U.S. at 383, 112 S. Ct. at 2037. In *Morales v. Trans World Airlines*, the Court drew from its previous interpretation of the similarly worded Employment Retirement Income Security Act (ERISA) and adopted a standard that gave the "relating-to" phrase a broad preemptive purpose. *Id.* at 384, 112 S. Ct. at 2037. Under this standard, "[s]tate enforcement actions having a *connection with or reference to* airline

---

[1] Prior to a 1994 recodification, the preemption clause provided that [n]o state * * * shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier. 49 U.S.C.A. § 1305(a)(1), *cited in Wolens*, 513 U.S. at 222-23, 115 S. Ct. at 817. Congress intended the revision to make no substantive change. *Wolens*, 513 U.S. at 222-23 n.1; 115 S. Ct. at 821 n.1.

'rates, routes, or services' are preempted." *Id.* (emphasis added) (citation omitted).

Applying the "connection with" or "reference to" standard, the *Morales* Court held that the ADA preempted state enforcement of advertising regulations. *Id.* at 391, 112 S. Ct. at 2041. The Court reasoned that the advertising provisions related to fares within the meaning of the ADA not only because they expressly referred to them, but also because they reduced the incentive to price competitively. *Id.* at 388, 112 S. Ct. at 2039 (" '[w]here consumers have the benefit of price advertising, retail prices often are dramatically lower than they would be without advertising.' ").

Similarly, in *American Airlines v. Wolens*, the Court held that the ADA preempted a claim that American Airlines' retroactive modification of its frequent-flyer program violated the Illinois Consumer Fraud and Deceptive Business Practices Act. *Wolens*, 513 U.S. at 228, 115 S. Ct. at 823. The Court concluded with no difficulty that the "claims relate to 'rates,' i.e., American's charges in the form of mileage credits for free tickets and upgrades, and to 'services,' i.e., access to flights and class-of-service upgrades." *Id.* at 226, 115 S. Ct. at 823.

Since the 1992 *Morales* decision, however, the Court in its ERISA decisions has retreated from a purely textual interpretation of "relating to" and has shifted to an analysis of ERISA's structure or purpose to determine the scope of its preemption. In 1995, the Court noted that an "uncritical literalism" in applying the "connection to" language "is no more help than in trying to construe 'relate to.' " *Travelers*, 514 U.S. at 656, 115 S. Ct. at 1677. Thus, the

Court concluded that it must "go beyond the unhelpful text" and "look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *Id.* In 1997, relying on *Travelers*, the Court again defined ERISA's preemptive reach by looking to ERISA's objectives. *California Div. of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 519 U.S. 316, 325, 117 S. Ct. 832, 838 (1997) (analysis of "whether a state law has the forbidden connection" looks to objectives of ERISA and effect of state law on ERISA plan).

Some federal courts have adopted the Court's narrowed ERISA preemption analysis in resolving controversies arising under the ADA's preemption clause. The Ninth Circuit, for example, has concluded that Congress intended to preempt "only state laws and lawsuits that would adversely affect the economic deregulation of the airlines and the forces of competition within the airline industry." *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1261 (9th Cir. 1998) (en banc). Similarly, the Second Circuit has observed that " '[r]elated to' appears to be developing, to some degree, to mean whether state law actually 'interferes' with * * * airline deregulation." *Abdu-Brisson v. Delta Air Lines, Inc.*, 128 F.3d 77, 82 (2d Cir. 1997).

Under either the Morales textual standard or the Court's narrowed structure-and-purpose analysis of ERISA, Northwest's reissue fee relates to price. As the district court recognized, the $75 fee is a price the airline charges for reissuing an existing ticket for travel on a different day. Leonard's argument that the $75 fee does not relate to price because it does not affect what Northwest

charges for travel from Point A to Point B is unpersuasive. The ADA's reach is not so limited. Also unpersuasive is Leonard's assertion that the reissue fee is unrelated to price because it is not included in the ADA's definition of price. The Act defines "price" as "rate, fare, or charge" without any further limitation (e.g., rate for what). 49 U.S.C. § 40102(a)(35) (1994). Leonard would have this court construe the term to mean "rate for transport," but the Act contains no such limiting language. Thus, applying the *Morales* textual-interpretation standard, we cannot say that the fee an airline charges for reissuing a ticket does not relate to price.

We reach the same conclusion under the structure-and-purpose standard. We are not persuaded by Leonard's argument that the application of penalty laws would not frustrate the intent of the ADA. She asserts that Congress must have contemplated state penalty laws because these laws promote efficiency, which is the driving force behind the ADA. *See* Daniel A. Farber, *Contract Law and Modern Economic Theory*, 78 *Nw. U.L. Rev.* 303, 333-39 (1983); Richard A. Posner, *Economic Analysis of the Law* 128-29 (4th ed. 1992). Congress expressed more than a desire to promote efficiency. It expressed a belief that efficiency is best promoted by deregulation of prices, routes, and services. Thus, because Leonard's claims would frustrate congressional intent to promote efficiency through price deregulation, the claims relate to price under the Court's more recent structure-and-purpose analysis.

Having concluded that Leonard's claims relate to and affect price, we do not address whether they relate to

services. Instead, we turn to the second part of the preemption test, whether Leonard's claim requires the enactment or enforcement of a state law, regulation, or other provision.

Enactment or enforcement

In Wolens, the Court held that contract claims relating to frequent-flyer benefits did not involve the enactment or enforcement of state laws, reasoning that the

> terms and conditions airlines offer and passengers accept are privately ordered obligations "and thus do not amount to a State's 'enact[ment] or enforce[ment] [of] any law, rule, regulation, standard or other provision having the force and effect of law.' "

Wolens, 513 U.S. at 228-29, 115 S. Ct. at 824 (citation omitted).

The Court distinguished, however, between contract claims that seek simply to enforce the bargain of the parties and those that require the enforcement of state law or policy outside the contract:

> This distinction between what the State dictates and what the airline itself undertakes confines courts, in breach-of-contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement.

Id. at 233, 115 S. Ct. at 826. *See also Smith v. Comair, Inc.*, 134 F.3d 254, 257 (4th Cir. 1998) (contract claim preempted when airline's defenses to breach were based on

federal law "which is clearly external to the parties' agreement").

Applying *Wolens*, federal courts have found many contract claims not preempted by the ADA. *See In re Air Transp. Excise Tax Litigation*, 37 F. Supp. 2d 1133, 1140 (D. Minn. 1999) (dispute over whether Federal Express breached contract with customers by continuing to collect amount equal to expired tax); *Deerskin Trading Post, Inc. v. UPS of America*, 972 F. Supp. 665, 672-73 (N.D. Ga. 1997) (dispute over whether UPS followed contractual provisions for determining packages' weight); *Chrisafiss v. Continental Airlines, Inc.*, 940 F. Supp. 1292, 1298 (N.D. Ill. 1996) (contract dispute over passenger's right to reboard plane); *Seals v. Delta Air Lines*, 924 F. Supp. 854, 858 (E.D. Tenn. 1996) (dispute over whether contract required Delta to provide wheelchairs at airports); *Chukwu v. Board of Directors Varig Airline*, 880 F. Supp. 891, 895 (D. Mass. 1995) (contract dispute alleging failure to transport).

Leonard's claims rest on a Minnesota common-law contract rule against penalties. The rule against contract penalties is an equitable doctrine arising from a public policy against compulsion and has at its foundation the unconscionability doctrine. E. Allan Farnsworth, *Contracts*, § 12.18 (1982); John D. Calamari & Joseph M. Perillo, *Contracts*, 564-65 (1977). The parties' bargain is irrelevant to the rule and often is frustrated by its application. Farnsworth, *supra*, at § 12.18; Calamari & Perillo, *supra*, at 564-65. Leonard's claims would require the district court to take into account public policy considerations outside Leonard's agreement with Northwest. Because the claims are unrelated to the contract of carriage with Northwest,

but instead seek to enforce state-imposed obligations against contract penalties, they are preempted.

Other state courts' decisions support our conclusion that the ADA preempts illegal-penalty claims. *See Blackner v. Continental Airlines*, 709 A.2d 258, 260 (N.J. Super. Ct. App. Div. 1998) (dismissing breach-of-contract claims arising from $60 surcharge to replace lost ticket), *certification denied*, 719 A.2d 637 (N.J. 1998), *cert. denied*, 119 S. Ct. 1034 (1999); *Boon Ins. Agency, Inc. v. American Airlines*, No. 98-08724 (Travis County, Tex. Feb. 2, 1999) (dismissing breach-of-contract claim arising from reissue fee) (appeal pending). These decisions are, of course, not binding on us, but provide comparative analysis and insight.

Leonard argues that her claims should not be preempted because they cannot be brought in any other forum. *See Wolens*, 513 U.S. at 231-32, 115 S. Ct. at 825. Congress has, however, retained in the federal Department of Transportation (DOT) the authority to regulate trade practices of the airlines. *Id.* at 228 n.4, 115 S. Ct. at 823 n.4. The DOT has used this authority to regulate reissue fees. 14 CFR § 253.7 (1999). Although the DOT has chosen only to require conspicuous notice of the fees, it could also choose to regulate the amounts. Thus, while Leonard does not have another forum in which she can adjudicate her grievance with Northwest directly, she can take her grievance to the DOT and ask it to take action. *See Wolens*, 513 U.S. at 228 n.4, 115 S. Ct. at 823 n.4 (noting that although consumer fraud claims preempted, plaintiff could seek recourse through the DOT); *see also Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54, 107 S. Ct. 1549, 1556 (1987) (availability of federal remedy is not a prerequisite to federal preemption).

Leonard also asserts that enforcement of the penalty rule should not be preempted because the rule is uniform in all 50 states. Leonard cites footnote eight in *Wolens* for the proposition that uniform laws are not preempted. 513 U.S. at 233, 115 S. Ct. at 826 n.8. Footnote eight addresses the argument that enforcement of the same agreement in different states might lead to differing interpretations of the agreement. *Id.* But the Court expressed its lack of concern about differing interpretations, noting that contract law is relatively uniform. *Id.* Thus, the court's footnote does not support an argument that *any* law may be imposed on the airlines so long as it is uniform. In fact, the *Morales* decision defeats that argument, since it involved consumer-protection statutes that were mostly uniform. 504 U.S. at 379, 112 S. Ct. at 2034.

II

Under Minnesota Rule of Civil Procedure 11, the signature of an attorney or party on a pleading certifies that the pleading is "well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." Minn. R. Civ. P. 11. Rule 11 authorizes the court to impose appropriate sanctions, including attorneys' fees, when a pleading is signed in violation of the rule. *Id.* The main purpose of rule 11 is to deter frivolous claims and defenses. *Uselman v. Uselman*, 464 N.W.2d 130, 142 (Minn. 1990). But the rule should be strictly construed:

> [A]s a matter of public policy, * * * the rule should be construed somewhat narrowly – while some sanctionable conduct might under these circumstances escape discipline, that is

> preferable to deterring legitimate or arguably legitimate claims.

Id. Sanctions should not be imposed when "counsel has an objectively reasonable basis for pursuing a factual or legal claim or when a competent attorney could form a reasonable belief a pleading is well-grounded in fact and law." *Id.* at 143 (citations omitted).

We review the propriety of rule 11 sanctions generally under an abuse-of-discretion standard. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 400, 110 S. Ct. 2447, 2458 (1990); *Uselman*, 464 N.W.2d at 142. But a legal determination that a pleading is not warranted by existing law or a good-faith argument may be set aside by an appellate court if the determination rests on an erroneous view of the relevant law. *Cooter & Gell*, 496 U.S. at 402, 110 S. Ct. at 2459; *see also Uselman*, 464 N.W.2d at 142 (stating that because Minn. R. Civ. P. 11 and Fed. R. Civ. P. 11 are essentially the same, cases interpreting federal rule offer valuable guidance).

This court may also award attorneys' fees incurred on appeal if an appeal is frivolous. Minn. Stat. § 549.211 (1998). The decision of whether to award attorneys' fees for frivolous claims rests within this court's broad discretion. *Van Vickle v. C.W. Scheurer & Sons, Inc.*, 556 N.W.2d 238, 242 (Minn. App. 1996).

Although we rule against Leonard, we cannot characterize her claims as frivolous or unwarranted by existing law. As the Supreme Court has recognized, ADA preemption is an area of the law that may not be settled "on the basis of one or two cases, but require[s] a closer working out." *Wolens*, 513 U.S. at 234-35, 115 S. Ct. at 827. While

Wolens articulates the analysis in which courts must engage, the "line separating allowable claims from ADA-preempted ones remains fuzzy." *In re Air Transp. Excise Tax Litigation*, 37 F. Supp. 2d at 1140. Furthermore, Leonard's interpretation of the ADA after *Wolens* is no more frivolous or unwarranted than were the *Wolens* plaintiffs' claims in light of *Morales*. Had the Illinois courts imposed sanctions in that case, the plaintiffs might not have appealed and the Supreme Court might not have decided *Wolens*, a decision that has become crucial to ADA-preemption analysis. In deterring frivolous claims, we must be careful not to deter colorable claims for changes in the law or to impede further evolution of existing precedent. We therefore reverse the district court's attorneys' fee award. For the same reasons, we decline to award fees incurred on appeal.

DECISION

Leonard's breach-of-contract and unjust-enrichment claims are preempted by the ADA because they relate to price and seek the enforcement of state law. We therefore affirm the dismissal of Leonard's claims. But Leonard's claims are not frivolous and do not justify attorneys' fees under rule 11 or Minnesota Statutes section 549.211 (1998). We therefore reverse the district court's imposition of attorneys' fees and decline to impose an award of fees incurred on appeal.

Affirmed in part and reversed in part; motion denied.

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF DAKOTA FIRST JUDICIAL DISTRICT

Beth Leonard, on behalf of herself and all others similarly situated,

Plaintiff,

v.

Northwest Airlines, Inc.,

Defendant.

File No. 19-C6-99-6083

AMENDED FINDINGS AND ORDER AND JUDGMENT

(Dated April 7, 1999)

The above-entitled matter came before the Honorable Rex D. Stacey, Judge of District Court, on March 18, 1999, at the South St. Paul Municipal Building, South St. Paul, Minnesota.

Samuel D. Heins, Daniel E. Gustafson, and Karla M. Gluek of Heins Mills & Olson, P.L.C., 700 Northstar East, 608 Second Avenue South, Minneapolis, Minnesota 55402 appeared on behalf of the Plaintiff.

Thomas Tinkham and Carol A. Peterson of Dorsey & Whitney LLP, Pillsbury Center South, 220 South Sixth Street, Minneapolis, Minnesota 55402 appeared on behalf of the Defendant.

Based upon the arguments of counsel and upon all the files, records, and proceedings herein, the Court makes the following:

ORDER

1. Defendant's motion to dismiss is granted and the complaint herein is dismissed with prejudice.

2. Defendant's motion for attorneys' fees and costs is granted in the amount of $500.

3. The attached memorandum is incorporated by reference.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: April 7, 1999

BY THE COURT:

/s/ Rex D. Stacey
Rex D. Stacey
Judge of District Court

JUDGMENT

I HEREBY CERTIFY THAT THE ABOVE ORDER CONSTITUTES THE JUDGMENT OF THIS COURT.

DATED: APRIL 7, 1999
(SEAL)

VAN A. BROSTROM,
COURT ADMINISTRATOR
BY: /s/ Victoria Mayer
DEPUTY

MEMORANDUM

This matter concerns the Plaintiff's purchase of a non-refundable air travel ticket from the Defendant, and the Defendant's application of a $75.00 reissue fee when

the Plaintiff changed her travel dates. Plaintiff alleges that this charge is impermissible under Minnesota state contract law because it constitutes a liquidated damages penalty. Plaintiff has requested that her suit be certified as a class action, and seeks damages and injunctive relief prohibiting the Defendant from applying its reissue fee to other customers.

The Defendant has made a motion to dismiss Plaintiff's complaint on the ground that her claims are preempted by the Airline Deregulation Act, 49 U.S.C. § 41713 (b)(1), and for attorneys' fees and costs under Rule 11 of the Minnesota Rules of Civil Procedure.

Motion to Dismiss

Under Minnesota Rule of Civil Procedure 12.02(e), a complaint should be dismissed for failure to state a claim if "it appears to a certainty that there are no facts, consistent with the pleadings, sufficient to establish a right for relief." *614 Co. v. Minneapolis Community Dev. Agency*, 547 N.W.2d 400, 405 (Minn.Ct.App. 1996) (quotations omitted). The burden of showing there are no genuine fact issues is on the moving party, against whom all doubts must be resolved. *Albers v. Wilson & Co.*, 184 F. Supp. 812 (D. Minn. 1960).

Under the Preemption Doctrine, "conflicts between federal law and state law are to be resolved in favor of federal law." *Brandt v. Marshall Animal Clinic*, 540 N.W.2d 870, 874 (Minn.Ct.App. 1995). A Complaint that contains only preempted causes of action fails to state a claim upon which relief may be granted.

Airline Deregulation Act

The Airline Deregulation Act (ADA) provides that states "may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route or service of an air carrier. . . . " 49 U.S.C. § 41713(b)(1).

In order to determine whether the ADA preempts the Plaintiff's claims, the Court must use a two-prong analysis. *See American Airlines, Inc. v. Wolens*, 513 U.S. 219, 226 (1995). The Court must first determine whether the subject of the claim has a connection with or reference to airline rates, routes, or services. *See id.* If there is a relation, the Court must next consider whether the subject of the claim involves the enforcement by the state of a law, regulation, or other provision having the force and effect of law. *Id.* If enforcement of a state law is required, the claim is preempted by the ADA. *See id.* at 228.

Claim Has a Connection to Defendant's Rates and Services

In this case, the reissuance fee is a price, and therefore has a connection with the Defendant's rates. The Plaintiff purchased a non-refundable, discounted ticket upon the condition that she use the ticket as issued, or pay a $75 reissuance fee to change the itinerary. This was the contract the Plaintiff entered into with the Defendant when she chose to purchase the discounted ticket rather than a ticket that was fully refundable and exchangeable. The reduced price, non-refundable nature of the ticket, and reissuance fee were all pricing terms of the ticket she purchased. Consequently, the subject of the claim has a

connection to the Defendant's rates and falls within the scope of the ADA. *See Wolens*, 513 U.S. at 226 ("We need not dwell on the question whether plaintiffs' complaints state claims relating to air carrier rates, routes, or services . . . Plaintiffs' claims relate to 'rates,' i.e., American's charges in the form of mileage credits for free tickets and upgrades" (quotations omitted)); *Statland v. American Airlines, Inc.*, 998 F.2d 539, 541-42 (7th Cir. 1993) ("We think it obvious that canceled ticket refunds relate to rates."); *Blackner v. Continental Airlines, Inc.*, 709 A.2d 258, 260 (N.J.Super.A.D. 1998) (same) (quoting *Statland*) *cert. denied*, 119 S.Ct. 1034 (1999); *Johnson v. American Airlines, Inc.*, 663 N.E.2d 54, 56 (Ill.App. 1996) ("plaintiffs' claims regarding the refunds on airlines' tickets were closely connected to rates").

Additionally, Plaintiff's claims relate to the Defendant's service of reissuing tickets and rescheduling air travel. Under the ADA, " 'Services' generally represent a bargained-for or anticipated provision of labor from one party to another." *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 336 (5th Cir. 1995) (en banc) (quotations omitted). Items such as ticketing constitute service. *Id.* Accordingly, Defendant's service of reissuing a ticket to the Plaintiff places the transaction within the scope of the ADA.

Cause of Action Requires Enforcement of Minnesota Substantive Law

Under the ADA, a cause of action that relates to an airline's prices, routes or services is preempted if the action requires enforcement of state law. *See* 49 U.S.C.

§ 41713(b)(1). Because the $75 reissuance fee has a connection to the Defendant's rates, and because reissuing a ticket is part of the Defendant's services, state law may only be used to enforce the parties' bargain. *Wolens*, 513 U.S. at 233 n.8.

In this case, the Plaintiff has not brought her suit to enforce the terms of her contract with the Defendant. Rather, she wishes to use Minnesota substantive law to avoid the contract as unconscionable, in order to rewrite the bargained-for agreement. This action is precluded by the ADA. *See Blackner*, 709 A.2d at 260 ("The essence of her claim is an enlargement or enhancement of her rights based on state laws or policies external to the agreement, which, she says, should invalidate a portion of the contract between her and the airline. The complaint violates the essence of the preemption provision of § 1305(a)(1) and thus it cannot stand."); *see also Smith v. Comair, Inc.* 134 F.3d 254, 257 (4th Cir. 1998) ("when a contract claim cannot be adjudicated without resort to outside sources of law, the claim is still preempted by the ADA"); *Johnson*, 663 N.E.2d at 57 ("if the source of the obligation that has allegedly been breached is a state law or policy, external to the airline's own self-imposed undertaking, a breach of the obligation is preempted).

Additionally, other courts have held that claims identical to the Plaintiff's are preempted by the ADA. *See Blackner*, 709 A.2d at 260 (breach of contract and unjust enrichment claims premised on ticket reissuance fee preempted by ADA); *Boon Ins. Agency, Inc. v. American Airlines, Inc.*, No. 98-08724 (Travis County, Texas, February 2, 1999) (breach of contract and unjust enrichment claims premised on ticket reissuance fee preempted by ADA).

Similarly, because Plaintiff's complaint attempts to regulate the Defendant's rates and services under Minnesota law, it is preempted by the ADA.

Attorney's Fees and Costs

Under Minnesota Rule of Civil Procedure 11, the signature of an attorney on a pleading certifies that it "is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." Minn.R.Civ.P. 11 (1999). If a pleading "is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties, the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including reasonable attorney fees. *Id.*

Because the Plaintiff's claims are clearly preempted by the ADA, this lawsuit is unwarranted. Accordingly, Defendant's motion for its costs and reasonable attorneys' fees incurred by its defense of this action is granted in the amount of $500. Defendant shall submit its petition for attorneys' fees and costs pursuant to Rule 119, General Rules of Practice, within ten days of this Order.

Supreme Court, U.S.
FILED
AUG 16 2000
CLERK

(2)

No. 00-109

In The

Supreme Court of the United States

BETH LEONARD, On Behalf of Herself and all Others Similarly Situated,

Petitioner,

vs.

NORTHWEST AIRLINES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The State Of Minnesota Supreme Court

BRIEF IN OPPOSITION

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QUESTION PRESENTED

American Airlines, Inc. v. Wolens, 513 U.S. 219, 232-33 (1995), ruled that the Airline Deregulation Act's (ADA) preemption clause permits "routine breach-of-contract claims" that enforce agreed-upon terms but "stops States from imposing their own substantive standards with respect to rates, routes, or services," and therefore "confines courts, in breach-of-contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement." The Petitioner's suit in this case seeks to use Minnesota state law to change a bargained-for price term in a fully-performed contract of air carriage. Accordingly, the question presented is:

Where the Minnesota Court of Appeals interpreted the state law which Petitioner sought to use as requiring it to consider state policy which was "outside" the parties' bargain as to price, was it correct to follow *Wolens* and hold that Petitioner's suit was preempted by the ADA?

CORPORATE DISCLOSURE STATEMENT

Respondent Northwest Airlines, Inc., is an indirect, wholly-owned subsidiary of Northwest Airlines Corporation, a publicly traded company. As of December 31, 1999, based on a Schedule 13G filed with the Securities and Exchange Commission, AXA Financial, Inc. (formerly known as the Equitable Companies Incorporated), through subsidiaries and affiliates, had beneficial ownership of more than 10% of Northwest Airlines Corporation's common stock.

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BRIEF IN OPPOSITION

Respondent Northwest Airlines, Inc. ("Northwest"), respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the Minnesota Court of Appeals' decision in *Beth Leonard, et al. v. Northwest Airlines, Inc.*, 605 N.W.2d 425 (Minn. Ct. App. 2000), *review denied*, Apr. 18, 2000.[1] In *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), this Court explicitly addressed the only issue presented in this case, and made clear that under the ADA's preemption clause, state law may not be used to regulate price terms contained in an air carrier's air travel contract. The Minnesota Court of Appeals correctly adhered to this Court's decision in *Wolens*, and there are no decisions in conflict with that intermediate state appellate court ruling; every court to consider this issue has held that identical claims are preempted. Because this Court's precedent is clear, recent, and not causing confusion on this point, this petition should be denied.

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[1] The petition states on its cover that it seeks a writ of certiorari "to the State of Minnesota Supreme Court." That court, however, did no more than exercise its discretion summarily to deny a petition for review. *See* Pet. App. at 1; Minn. R. Civ. App. P. 117, subd. 2 ("[r]eview of any decision of the Court of Appeals is discretionary with the Supreme Court").

STATEMENT OF THE CASE

A. Factual Background

Northwest, headquartered in the Twin Cities in Minnesota, is an airline providing national and international air transportation to millions of customers. Petitioner is an individual living in Minnesota who purchased a ticket from Northwest for cross-country air travel during the period October 24, 1998 to October 28, 1998. The terms and conditions of Petitioner's travel with Northwest were set forth in a Contract of Carriage between the parties. Although Petitioner could have chosen to purchase a more expensive but fully refundable ticket from Northwest, she instead purchased a heavily-discounted, nonrefundable ticket. By choosing to purchase a heavily-discounted ticket, Petitioner accepted the *quid pro quo* that she use the ticket as issued or pay a $75.00 reissuance fee to change her itinerary. When Petitioner later changed her travel plans and asked Northwest to reissue her tickets for a different flight, Northwest followed the terms of the contract and charged her the $75.00 reissue fee. Petitioner paid this fee, Northwest changed and reissued her tickets, and the contract between Petitioner and Northwest was fully performed.

On January 7, 1999, Petitioner brought her complaint against Northwest in the Dakota County District Court, First Judicial District, Minnesota. In her complaint, Petitioner alleged that by charging her $75.00 to reissue her tickets, Northwest had violated Minnesota's "contract law" and had been unjustly enriched in violation of Minnesota law. Petitioner did not allege, however, that Northwest failed to adhere to the terms of the contract, or

that Northwest took any action not specifically allowed by the contract. Instead, Petitioner's claims were based solely on her contention that the terms of the contract were unconscionable and that Northwest's $75.00 fee for reissuing her ticket represented a liquidated damages penalty that is prohibited under Minnesota law. Purportedly bringing her suit on a nationwide class basis, Petitioner sought damages, costs, attorneys' fees, declaratory relief, and an injunction prohibiting Northwest from adhering to its contracts throughout the United States with regard to charging customers a $75.00 ticket reissue fee.[2]

B. Procedural Background

Following service of the complaint, Northwest moved to dismiss pursuant to Minnesota Rule of Civil Procedure 12.02 for the complaint's failure to state a claim upon which relief could be granted because Petitioner's claims were preempted by the ADA. On April 7, 1999, the Honorable Rex D. Stacey, Dakota County District Court, Minnesota, dismissed Petitioner's complaint

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[2] The United States Department of Transportation has promulgated and enforces a federal regulation that explicitly relates to ticket reissuance fees. *See* 14 C.F.R. § 253.7 ("A passenger shall not be bound by any terms *restricting refunds of the ticket price, imposing monetary penalties on passengers,* or permitting the carrier to raise the price, *unless the passenger receives conspicuous written notice of the salient features of those terms on or with the ticket.*" (emphasis added)). Petitioner has never attempted to invoke this regulation, and she has never argued that Northwest failed to meet all obligations imposed by federal law.

with prejudice. *See* Amended Findings and Order and Judgment (Apr. 7, 1999) at 2; Pet. App. at 18. Judge Stacey reasoned that the price Northwest charges for the service of reissuing a ticket relates to both the airline's prices and services. *Id.* at 4-5; Pet. App. at 20-21. Judge Stacey cited this Court's decision in *Wolens*, and noted that Petitioner had "not brought her suit to enforce the terms of her contract with the Defendant. Rather, she wishes to use Minnesota substantive law to avoid the contract as unconscionable, in order to rewrite the bargained-for agreement." *Id.* at 6; Pet. App. at 22. Judge Stacey concluded that "because Plaintiff's complaint attempts to regulate the Defendant's rates and services under Minnesota law, it is preempted by the ADA." *Id.* at 7; Pet. App. at 23.

Petitioner then appealed to the Minnesota Court of Appeals. On February 8, 2000, a unanimous panel of the Minnesota Court of Appeals affirmed Judge Stacey's dismissal of Petitioner's complaint on the ground of ADA preemption. *See Leonard*, 605 N.W.2d at 427; Pet. App. at 3. The Minnesota Court of Appeals agreed with Judge Stacey that the price Northwest charges to change and reissue discounted tickets relates to "price" for purposes of ADA preemption. *See id.* at 430; Pet. App. at 9-10. Relying on this Court's distinction in *Wolens* "between contract claims that seek simply to enforce the bargain of the parties and those that require the enforcement of state law or policy outside the contract," *id.* at 431; Pet. App. at 11 (citing *Wolens*, 513 U.S. at 233), the Minnesota Court of Appeals concluded that Petitioner's claims were preempted. Construing Minnesota law, the court determined that:

> Leonard's claims rest on a Minnesota common-law contract rule against penalties. The rule against contract penalties is an equitable doctrine arising from a public policy against compulsion and has at its foundation the unconscionability doctrine. The parties' bargain is irrelevant to the rule and often is frustrated by its application. Leonard's claims would require the district court to take into account public policy considerations outside Leonard's agreement with Northwest.

Id.; Pet. App. at 12 (citations omitted). Thus, the Minnesota Court of Appeals concluded that "[b]ecause [Leonard's] claims are unrelated to the contract of carriage with Northwest, but instead seek to enforce state-imposed obligations against contract penalties, they are preempted." *Id.*; Pet. App. at 12-13.

Petitioner sought discretionary review of the Minnesota Court of Appeals' decision in the Minnesota Supreme Court. The Minnesota Supreme Court summarily denied the petition for review on April 18, 2000. Pet. App. at 1.

REASONS FOR DENYING THE PETITION

I. THE MINNESOTA COURT OF APPEALS CORRECTLY FOLLOWED THIS COURT'S DECISION IN *WOLENS*

In 1978, believing that "maximum reliance on competitive market forces would best further efficiency, innovation, and low prices as well as variety and quality of air transportation services," *Morales v. Trans World Airlines,*

Inc., 504 U.S. 374, 378 (1992) (quotations and ellipses omitted), Congress enacted the ADA to deregulate the industry. *See id.* The ADA contains an express preemption clause which provides that a state "may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier. . . . " 49 U.S.C. § 41713(b)(1).[3] The ADA's preemption clause was enacted "[t]o ensure that the States would not undo federal deregulation with regulation of their own. . . . " *Morales*, 504 U.S. at 378.

In *Wolens*, this Court's most recent interpretation of the ADA's preemption clause, the plaintiffs claimed that retroactive changes to American Airlines' frequent flier program violated the Illinois Consumer Fraud Act and constituted a breach of contract. This Court concluded that the fraud claims were preempted because "the [Illinois] Consumer Fraud Act serves as a means to guide and police the marketing practices of the airlines; the Act does not simply give effect to bargains offered by the airlines and accepted by airline customers." *Wolens*, 513 U.S. at 228. The breach of contract claims, however, were not preempted because "routine breach-of-contract claims," *id.* at 232, did not involve state regulation of an airline, but instead were merely attempts to hold the airline to the terms of the bargains to which it had agreed. This Court emphasized the distinction between the imposition

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[3] The ADA's preemption clause was previously codified at 49 U.S.C. App. § 1305(a)(1). Although § 1305(a)(1) referred to "rates, routes, or services" rather than "price, route or service," Congress declared that no substantive change was intended by the recodification. *See* H.R.Rep.No. 180, 103d Cong., 2d Sess. 1 (1993), *reprinted in* 1994 U.S.C.C.A.N. 818.

of state law and the enforcement of an airline's own bargain, explaining:

> The ADA's preemption clause, § 1305(a)(1), read together with the FAA's saving clause, stops States from imposing their own substantive standards with respect to rates, routes, or services, but not from affording relief to a party who claims and proves that an airline dishonored a term the airline itself stipulated. ***This distinction between what the State dictates and what the airline itself undertakes confines courts, in breach-of-contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement.***

Id. at 232-33 (emphasis added).[4]

Petitioner blatantly refuses to acknowledge this Court's explicit distinction between enforcing the terms of the parties' own agreement and imposing terms under state law that are contrary to that agreement. Thus, merely ignoring the clear language of the Court's rule quoted above, Petitioner simply misrepresents to this Court that the distinction "between a claim to *enforce* a contract, and a claim or defense challenging an illegal

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[4] The Federal Aviation Act's saving clause referenced by the *Wolens* Court provides that " 'nothing . . . in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.' " *Morales*, 504 U.S. at 378 (quoting 49 U.S.C. App. § 1506). In interpreting this saving clause, this Court held that this "general 'remedies' saving clause cannot be allowed to supersede the specific substantive pre-emption provision" contained in § 1305(a)(1) of the ADA. *Id.* at 385.

contract penalty" is "a hypertechnical distinction, found nowhere in *Wolens*[.]" Pet. at 9 (emphasis in original). Indeed, it has been her strategy throughout each stage of this litigation simply to disregard this Court's rule in *Wolens*, and to insist – directly contrary to the language of *Wolens* quoted above – that any claim that can be styled as being based on "contract law" should escape preemption, because contract law is "uniform."[5] The issue, however, is not whether Minnesota's regulation of Northwest's prices will or will not be the same as Hawaii's regulation, but whether any state's law is being used at all in an attempt to affect prices.

Here, Petitioner's claims are an attempt to regulate Northwest's prices through the application of Minnesota law. Petitioner did not bring her unjust enrichment and liquidated damages claims to enforce the terms of the contract she made with Northwest, but rather to avoid those terms. Indeed, the Minnesota Court of Appeals, interpreting Minnesota common law, concluded that "[t]he parties' bargain is irrelevant to the rule [against

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[5] In fact, there is no "uniform law" of liquidated damages. *Compare Dean Van Horn Consulting Assoc., Inc. v. Wold*, 395 N.W.2d 405, 407 (Minn. Ct. App. 1986) (under Minnesota law, "a liquidated damages clause is prima facie valid"), *with Pacheco v. Scoblionko*, 532 A.2d 1036, 1039 (Me. 1987) ("party seeking enforcement of a liquidated damages clause in a contract has the burden of proving its validity"); *see also id.* at 1038-39 & nn.4, 5 (noting decisional split and citing cases on each side). Nor is Minnesota's law of liquidated damages the same as California's law, where liquidated damages are controlled by statute, and different statutory provisions apply to different contractual subject matters. *See Ridgley v. Topa Thrift & Loan Ass'n*, 953 P.2d 484, 487 (Cal. 1998).

penalties] and often is frustrated by its applications." *Leonard*, 605 N.W.2d at 431; Pet. App. at 12. Petitioner's contract with Northwest specifically required her to pay Northwest $75.00 to have her discounted, nonrefundable ticket changed and reissued. Instead of alleging any violation by Northwest of the *contract*, Petitioner based her claims "against Northwest for violation of *contract law*. . . . " Complaint ¶ 10 (emphasis added). Under Petitioner's theory, Northwest should change its contractual price for its service of reissuing tickets – not just for her, but for all of its customers throughout the United States – because that price term conflicts with her view of Minnesota's public policy. These claims are precisely those preempted by the ADA, as this Court specifically recognized in *Wolens*.[6]

The Minnesota Court of Appeals made exactly the same distinction this Court made between the permissible enforcement of the terms of a contract and the impermissible imposition of state public policy contrary to the terms of that contract. There is no conflict between the *Wolens* holding and the Minnesota Court of Appeals' decision, let alone any that would merit certiorari review.

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[6] Indeed, the precise grounds for Petitioner's claims – the doctrine of unconscionability – was used as an example by the United States, as an amicus curiae in *Wolens*, of a contract law that would be preempted under the ADA. *See* Br. for United States as Amicus Curiae at 28 ("Some state-law principles of contract law (*such as the doctrine of unconscionability*) might well be preempted to the extent they seek to effectuate the State's public policies, rather than the intent of the parties." (emphasis added)). This Court was express in its adoption of the United States' position on preemption in the *Wolens* case. *Wolens*, 513 U.S. at 233.

II. THERE IS NO CONFLICT OR CONFUSION HERE; EVERY LOWER COURT CONSIDERING THE IDENTICAL ISSUE HAS CONSISTENTLY APPLIED *WOLENS* TO PREEMPT SUCH CLAIMS

Courts in Texas, Washington, and New Jersey have also held that claims virtually identical to those raised by Petitioner are preempted by the ADA. Petitioner has failed to cite to any of these cases. In *Boon Ins. Agency, Inc. v. American Airlines, Inc.*, 17 S.W.3d 52 (Tex. Ct. App. 2000), the unsuccessful plaintiff – represented by the same law firm as Petitioner here – brought suit against American Airlines, alleging that a ticket reissue fee constituted an unlawful penalty under Texas law. Relying on *Wolens*, the Texas Court of Appeals held that the suit was preempted by the ADA. *See id.* at 58-59 ("If we were to adjudicate Boon's claim, we would be applying state policy and law to determine the propriety of the reissue fee. Such application of state law is preempted by the Act.").

In *Howell v. Alaska Airlines, Inc.*, 994 P.2d 901 (Wash. Ct. App. 2000), plaintiff sued Alaska Airlines, alleging that its policy of not refunding nonrefundable tickets was unconscionable and constituted unjust enrichment. The Washington Court of Appeals held that the claims were preempted by the ADA. *See id.* at 905 ("the appellants are attempting to enlarge or enhance their agreements with Alaska based on the laws or policies of this state that are external to the agreements. Under the ADA, particularly as construed by the Supreme Court in *Wolens*, the appellants' claims are preempted").

In *Blackner v. Continental Airlines, Inc.*, 709 A.2d 258 (N.J.Super.A.D. 1998), *cert. denied*, 525 U.S. 1142 (1999), plaintiff alleged that a $60.00 surcharge to replace a lost ticket constituted unjust enrichment and was a penalty prohibited by New Jersey law. *See id.* at 259. The *Blackner* court dismissed her claims, holding that, under *Wolens*, they were preempted by the ADA. *See id.* at 260 ("What plaintiff seeks is not to enforce the contract but to overturn it through a declaration invalidating the $60.00 surcharge provision. And she seeks that relief because she claims that the surcharge provision constitutes a penalty and is thus barred by the law of this state. . . . Plaintiff's suit clearly falls on the prohibited side of the line drawn in *Wolens*.").

By contrast, Petitioner has failed to cite *any* authority to suggest that, contrary to *Wolens'* express language, states may regulate an airline's prices through operation of some provision of "contract law" despite a contrary agreement in the contract. Whether or not there may be other aspects of ADA preemption on which the lower courts are divided, the uniformity of authority on this point demonstrates that there is no confusion as to the meaning of *Wolens* or the scope of the ADA's preemption clause as it pertains to the only preemption issue presented here. Under the plain language of the ADA and this Court's holding in *Wolens*, Petitioner's claims are clearly preempted.

CONCLUSION

The petition for a writ of certiorari should be denied.

August 16, 2000

Respectfully submitted,

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(3)

No. 00-109

Supreme Court, U.S.
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In The

Supreme Court of the United States

BETH LEONARD, On Behalf of Herself and all Others Similarly Situated,

Petitioner,

vs.

NORTHWEST AIRLINES, INC.,

Respondent.

On Petition For Writ Of Certiorari To The State Of Minnesota Supreme Court

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. ARGUMENT

A. Respondent Incorrectly Asserts That This Court Has Already Decided the Question Presented

The Question Presented by this Petition is clear and easily stated: whether, under *American Airlines v. Wolens*, 513 U.S. 219 (1995), the Airline Deregulation Act ("ADA") preempts state-court contract actions in which a ticket purchaser sues an airline to *recover* monies she paid pursuant to penalty clauses that are uniformly forbidden under contract law. *Wolens* appears to answer the Question in the negative, because "contract law is not at its core 'diverse, nonuniform, and confusing,' " *id.* at 233 n.8 (citation omitted), and the ADA "permits state-law-based court adjudication of routine breach-of-contract claims." *Id.* at 232.

But Respondent's Brief in Opposition clouds the Question Presented. It fails adequately to address Petitioner's claim that the Minnesota courts have reached decisions that conflict with governing Supreme Court precedent, and responds to the overriding question of whether certiorari is warranted with little more than a cursory brief on the merits. Respondent's Opposition incorrectly claims that Petitioner is trying to rewrite "a bargained-for price term" in a contract, Opp. at i, and "avoid" the entire contract. Opp. at 4. Not so. Petitioner Beth Leonard admits that she breached the contract of carriage, Pet. at 5, and seeks only to recover monies she paid pursuant to illegal contractual penalties that are

uniformly forbidden under settled American jurisprudence.[1]

Respondent's Opposition also asserts, without foundation, that this Court already has "explicitly addressed" the issue presented in this case, "clear[ly]" holding that Petitioner's claims are preempted. Opp. at 1. That simply is untrue. *Wolens* addressed only whether the ADA preempted the application of Illinois consumer protection and contract law to a contract dispute between Myron Wolens and American Airlines. *Wolens*, 513 U.S. at 225-26. This Court held that Plaintiff Wolens' common-law contract claim could proceed, *id.* at 226, and sent the dispute back to the Illinois state court for a "full airing" of "contract interpretation" issues. *Id.* at 234. It certainly did not expressly consider whether either party could assert a contract *defense* in the action – although the Minnesota Opinion incorrectly believed it did. App. 11. Thus, Petitioner's Question Presented remains unanswered, and the lower courts' erroneous interpretations of the ADA and resultant opinions that conflict with *Wolens* remain ripe for review by this Court.

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[1] Respondent tries to manufacture an incongruity in contractual penalty law by comparing Maine's burden-of-proof requirement related to liquidated damages with Minnesota's holding that liquidated damages clauses are presumptively valid until proved otherwise. Opp. at 8 n.5. These *procedural* differences do not alter by one iota the underlying *substantive* reality: penalties disguised as liquidated damages clauses will not be enforced in *any* state in the Union. Pet. at 5-6.

B. Respondent Fails to Show Why This Court Should Not Decide Whether the Airlines May Properly Utilize Overbroad Preemption Decisions to Skirt Federalism Concerns and Ignore Normative Contract Rules

Respondent barely addresses the second half of the Petition, in which Petitioner explained that the Question Presented poses an important issue of federal law with significant practical consequences. Petitioner pointed out that the Minnesota Opinion improperly elevates airlines to modern-day fiefdoms, unaccountable to any injured party asserting – or defending against – contract claims that cannot be pigeonholed as simple "breaches." Pet. at 13-14.

The Respondent does not answer Petitioner's argument that bedrock principles of federalism require that courts not expand the scope of preemption beyond that which Congress clearly mandated. Pet. at 14. Nor does Respondent adequately respond to the observation this Court made when it last addressed ADA preemption in 1995: that ADA issues could not be settled " 'on the basis of one or two cases, but require a closer working out.' " *See Wolens*, 513 U.S. at 234-35 (citation omitted).

That "closer working out" has yet to be completed.[2] Even the Minnesota Court of Appeals admitted as much.

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[2] *See also In re Air Transp. Excise Tax Litig.*, 37 F. Supp. 2d 1133, 1139 (D. Minn. 1999) (courts are "struggl[ing] to draw the line that separates allowable state law claims from ADA-preempted ones"); *Charas v. Trans World Airlines*, 160 F.3d 1259, 1263 (9th Cir. 1998) (en banc) (scope of ADA preemption has been the "source of considerable dispute since its enactment").

See App. 16 ("the 'line separating allowable claims from ADA-preempted ones remains fuzzy' "). It matters not that Respondent has dredged up a few cases from around the country that reached airline-friendly preemption conclusions. Opp. at 10-11. The fact that they incorrectly interpret the ADA and produce results in conflict with *Wolens* actually bolsters Petitioner's argument that a writ of certiorari is warranted. Moreover, this Court has never intimated that even a measurable trend of decisions in the lower courts warrants any deference in the face of erroneous statutory interpretation.[3] Although the lower courts may properly be regarded as laboratories in which issues may percolate and work themselves out, Respondent fails to explain why this Court should not step in at this point to correct an experiment gone awry.

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[3] *See, e.g., Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995) (reversing long line of appellate decisions holding that § 12(2) of the Securities Act of 1933 applies to private placements of securities).

II. CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

DATED: August 31, 2000

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